

Children's Exposure to Indecent Material on Cable: Denver Area Educational Telecommunications Consortium, Inc. v. FCC, and Interpretation of the Cable Television Consumer Protection and Competition Act of 1992

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**CHILDREN'S EXPOSURE TO INDECENT MATERIAL
ON CABLE: DENVER AREA EDUCATIONAL
TELECOMMUNICATIONS CONSORTIUM, INC.
V. FCC, AN INTERPRETATION OF THE
CABLE TELEVISION CONSUMER PROTECTION AND
COMPETITION ACT OF 1992**

Elizabeth Nau Smith

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INTRODUCTION

On June 28, 1996, the United States Supreme Court ruled in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*¹ that a federal statute provision permitting cable television operators to decide whether to allow public access channels to carry programs they reasonably believe are "patently offensive" violated the First Amendment.² However, in the same opinion, the Court upheld a similar pro-

1. 116 S. Ct. 2374 (1996) (plurality).

2. *Id.* at 2394-97. The federal statute at issue in *Denver Telecommunications Consortium* was the Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

Congress has defined cable operator as:

[A]ny person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

vision that applied only to leased access channels.³ The Court also struck down a third provision that required cable operators to segregate and block any patently offensive programming appearing on leased access channels and to unblock such programming within thirty days of a subscriber's written request to do so.⁴

Part I of this Note summarizes the cable regulations leading up to *Denver Telecommunications Consortium*. It also describes the functional and technological similarities and differences between the print, broadcast, telephone, and cable media, as well as the different approaches the Court has applied to these media in the face of various First Amendment challenges. Part II details the appellate court's en banc opinion, as well as the Supreme Court's plurality, majority, concurring, and dissenting opinions in *Denver Telecommunications Consortium*.

Part III analyzes the plurality's struggle to formulate an acceptable analysis to apply to First Amendment issues arising in the cable context, as well as to determine whose rights are paramount—the cable operator's, the cable programmer's, or the viewer's. Departing from the intermediate scrutiny test that the Court utilized in previous cable cases involving First Amendment challenges, the plurality adjudicated *Denver Telecommunications Consortium* without reference to a particular scrutiny level. It manipulated traditional First Amendment terminology, made inconsistent analogies to the broadcast industry, and left subsequent courts uncertain as to how to apply the abstruse rule of the case. A significant aspect of the plurality's inability to find a standard on which to base its analysis stemmed from the fact that cable technology had changed, and continues to change, at a rapid rate.⁵ Finally, Part IV discusses possible ramifications that this unprecedented decision will have on future First Amendment cases in the cable industry as well as in other technologically emerging communication industries.

47 U.S.C. § 522(5) (1994). The Court has defined cable operators as "those who own the physical cable network and transmit the cable signal to the viewer." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 628 (1994).

3. *Denver Telecomm. Consortium*, 116 S. Ct. at 2385-87. Leased access channels are aimed at bringing a wide "diversity of information sources" to cable subscribers. 47 U.S.C. § 532(a).

4. *Denver Telecomm. Consortium*, 116 S. Ct. at 2394.

5. See *infra* notes 6-16 and accompanying text.

I. BACKGROUND

A. *Technological Advancements and Government Regulation in the Cable Industry*1. *The Growth of the Cable Industry*

Cable television has undergone tremendous growth and change since its inception in the 1940s.⁶ The first cable systems were known as community antenna television ("CATV") and functioned solely to retransmit broadcast signals to rural and remote areas.⁷ Today, cable has grown from a "communications weakling" to a \$20 billion industry.⁸ This is evidenced by the fact that CATV systems comprised only nine percent of the market in 1970, whereas multi-channel cable systems now have the technological capability to reach over ninety percent of all American households.⁹ Now, more than sixty percent of all households with televisions subscribe to cable,¹⁰ and this figure is projected to grow beyond seventy percent.¹¹

Technological advancements have allowed cable television to operate through signals which are transmitted from satellites, master antennas, or local television studios to the cable operator and then retransmitted to the subscriber.¹² Cable television has the capability to provide subscribers with over one hundred channels.¹³ There are numerous "packages" from which a subscriber can choose. "Basic cable" includes programming from several broadcast stations and local affiliates, as well as additional channels like CNN, C-Span, and A&E.¹⁴ There are also "premium" packages which provide programming channels such as The Movie Channel, Playboy Television, and

6. See Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1459-60 (1996); Wally Mueller, Comment, *Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response*, 38 DEPAUL L. REV. 1051, 1052-58 (1989).

7. See Chen, *supra* note 6, at 1460; Mueller, *supra* note 6, at 1054.

8. Chen, *supra* note 6, at 1472.

9. *Id.*

10. *Alliance for Community Media v. FCC*, 56 F.3d 105, 124 (D.C. Cir. 1995) (en banc) (citing H.R. CONF. REP. NO. 102-862, at 56 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1238), *aff'd in part & rev'd in part sub nom. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996) (plurality). Another case found that approximately 59 million households subscribe to cable. *Action for Children's Television v. FCC*, 58 F.3d 654, 672 n.4 (D.C. Cir. 1995) (citations omitted), *cert. denied*, 116 S. Ct. 701 (1996).

11. *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174, 1190 (1997) (plurality); see *Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 259 (1991) (statement of Edward O. Fritts, President, Nat'l Ass'n of Broadcasters).

12. *Playboy Entertainment Group, Inc. v. United States*, 918 F. Supp. 813, 817 (D. Del. 1996).

13. *Id.*

14. *Id.*

ShowTime, to name a few.¹⁵ Also, many cable system operators offer pay-per-view programming, enabling customers to watch a certain movie, at a certain time, for a set fee.¹⁶

Like any industry that has experienced rapid success, the cable industry has had its fair share of growing pains. Legislators have struggled to enact regulations that keep pace with the complex and changing technical issues that cable television poses for the communications industry and the public at large. The following provides a brief overview of the legislation affecting the cable industry since its inception just fifty-eight years ago. This review is necessary for a thorough understanding of the complex issues surrounding *Denver Telecommunications Consortium*.

2. *The FCC Begins to Regulate*

During the 1950s and 1960s, cable television was regulated on a local and sometimes a state level, but not on a federal level.¹⁷ The Federal Communications Commission ("FCC") did not regulate cable initially because it mistakenly viewed cable as a temporary medium that would fade into the past once local broadcast systems were able to fill the "coverage vacuum."¹⁸ Obviously, this belief was misguided.¹⁹ As early as the late 1950s, the growth of the cable industry led the broadcast television industry to encourage the FCC to assert jurisdiction over the cable industry pursuant to the Communications Act of 1934.²⁰ Broadcasters lobbied for regulation because they feared that the physical characteristics of cable,²¹ as well as the increasing concentration of power in the cable industry,²² would cut into their advertising revenues and put many local broadcast channels out of business.²³

15. *Id.*

16. *Id.*

17. Mueller, *supra* note 6, at 1066-67.

18. *Id.* at 1067. "Coverage vacuum" refers to remote rural areas that were not serviced by local broadcast stations. *Id.*

19. See Chen, *supra* note 6, at 1460 (stating that by the 1960s, cable had become a bona fide competitor of broadcast television).

20. See Mueller, *supra* note 6, at 1067.

21. Greater than half of all cable systems in existence have the capability to carry between 30 and 53 channels, and 40% of cable subscribers receive more than 53 channels. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 628 (1994) (citing figures from 62 TELEVISION AND CABLE FACTBOOK I-69 (Albert Warren ed., 1994)). Cable also improves reception of programming by eliminating the signal interference that often occurs with over-the-air broadcasting. *Id.*

22. Ninety-nine percent of all communities are serviced by only one cable system. *Turner Broad. v. FCC*, 910 F. Supp. 734, 740 n.10 (D.D.C. 1995).

23. *Turner Broad.*, 512 U.S. at 633-34. Broadcast stations transmit signals to viewers at no charge and make money by selling advertising times, whereas cable systems charge viewers a

In the 1960s, the FCC began regulating the cable industry.²⁴ It required local-origination programming, where practical, as a condition for the carriage of broadcast signals.²⁵ FCC regulations mandated the cable operator to provide cameras, playback equipment, and studios for both the production and presentation of local programs.²⁶ In 1976, the FCC promulgated access requirements forcing cable operators to provide common-carrier channels for third parties to present their own programming.²⁷ These access rules required cable systems with more than 3,500 subscribers to carry broadcast signals of third parties.²⁸ The FCC believed that these access requirements promoted "the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public's choice of programs."²⁹ However, in 1979, the Court ruled against mandatory access requirements, finding them outside the FCC's jurisdiction under the Communications Act of 1934.³⁰

The early 1980s were a difficult time for cable because of public disillusionment with cable television's potential.³¹ Both consumers and legislators were disgruntled with cable because of unrealistic ex-

monthly fee to receive cable. *Id.* at 629. Thus, cable does not rely to such a great extent on selling advertising time to generate revenue. *Id.*; see also Jeff Gray, *Turner Broadcasting System, Inc. v. FCC: The Need for a New Approach in First Amendment Jurisprudence of the Cable Industry*, 29 U.S.F. L. REV. 999, 1008-09 (1995) (discussing differences between cable television and broadcast television).

24. In *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1963), broadcasters convinced the court that cable television hindered the FCC's ability to regulate the broadcast industry according to the public interest standard as required by the 1934 Communications Act. *Id.* at 362-63. In 1966, the FCC asserted jurisdiction over all cable television systems. CATV, 2 F.C.C.2d 725, 733-34 (1966).

25. See Mueller, *supra* note 6, at 1058-59. Local origination programming is originated and produced by the cable operator. *Id.* at 1056; see *supra* note 2 (defining cable operator). It is also directed, engineered, and controlled by cable operators. Mueller, *supra* note 6, at 1057. The cable operator determines the content of the programs and often sells advertising time during the show. *Id.* Cablecast on local origination channels includes "community bulletin boards (automated alphanumeric programming), public service announcements, local sports, public meetings, interview shows, panel discussions on public issues, local news, and call-in shows." *Id.* at 1058. Viewers often confuse local origination programming with access programming produced by outside third parties. *Id.*

26. CATV, 20 F.C.C.2d 201, 207 (1969).

27. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 691 (1979).

28. *Cable TV Capacity & Access Requirements*, 59 F.C.C.2d 294, 297 (1976).

29. *Midwest Video*, 440 U.S. at 694-95 (quoting *Cable TV Capacity*, 59 F.C.C.2d at 298).

30. *Id.* at 708-09. The Court found that access rules imposed common-carrier obligations on cable operators. *Id.* at 701. The Court distinguished this case from the origination rules at issue in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (plurality), because the access requirements in this case took away cable operators' control over the creative composition of their programming content, whereas the origination rules did not. *Midwest Video*, 440 U.S. at 700.

31. Mueller, *supra* note 6, at 1075.

pectations stemming from franchise agreements,³² whereby companies entered bidding contests and made "blue sky promises" to obtain exclusive cable franchises from municipalities.³³ Once granted, the municipality usually authorized the franchisee cable company to use public property for the construction of the physical plant necessary to operate the cable system,³⁴ and often local governments demanded concessions from the winning cable company that were unrelated to the delivery of cable service.³⁵ This frequently caused cable operators to miscalculate the costs of maintaining elaborate urban franchises, overestimate subscriber demand, and make unrealistic estimates of potential new service.³⁶

3. Congress Begins to Legislate

a. The Cable Communications Policy Act of 1984

In 1984, Congress first began regulating the cable industry with the passage of the Cable Communications Policy Act of 1984 ("1984 Cable Act").³⁷ Cable systems with at least thirty-six channels were required to set aside between ten and fifteen percent of their activated channels for commercial use by third parties unaffiliated with the cable operator ("leased access channels").³⁸ In addition, cable

32. *Id.* A franchise agreement is a contract between the municipality and the cable operator. *Id.* It allocates some channels to the full discretion of the cable operator, while reserving others for public access. *Id.* The franchise often specifies the nature of the cable system to be built, the service to be provided, and the rate to be charged. H. REP. NO. 98-934, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656.

33. Mueller, *supra* note 6, at 1075-76.

34. *Id.* at 1075.

35. *Id.* at 1075-76. The companies' concessions included payment of millions of dollars in front money to plant trees, computerization of the local library's card catalog, free service to handicapped residents, and repair of sewage systems. *Id.* at 1076; *see* Stephen R. Ross & Barrett L. Brick, *The Cable Act of 1984—How Did We Get There and Where Are We Going?*, 39 FED. COMM. L.J. 27, 34 (1987).

36. Mueller, *supra* note 6, at 1076.

37. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C. (1994)); Mueller, *supra* note 6, at 1074. For an overview of the 1984 Cable Act, *see* Adam R. Spilka, Note, *An Excess of Access: The Cable Communications Policy Act of 1984 and First Amendment Protection of Editorial Discretion*, 8 CARDOZO L. REV. 317, 326-30 (1986).

38. Cable Communications Policy Act of 1984 § 612(b), 47 U.S.C. § 532(b) (1994); *see* H.R. REP. NO. 98-934, at 31 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4668 (stating that leased access channels are "fundamental to the goal of providing subscribers with the diversity of information sources intended by the First Amendment"). *But see* William E. Lee, *Cable Leased Access and the Conflict Among First Amendment Rights and First Amendment Values*, 35 EMORY L.J. 563, 568-76 (1986) (finding that the House Committee on Energy and Commerce's statement regarding diversity was supported only by Supreme Court dicta).

franchising authorities³⁹ were given authority to require cable operators to set aside certain channels for public, educational, and governmental access ("PEG access channels").⁴⁰ The House Report described these channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet."⁴¹

Cable operators were allowed only minimal editorial control over the access channels.⁴² Cable operators could only exclude obscene programming, not indecent programming.⁴³ Cable operators, how-

39. A franchising authority is "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522(10).

40. Cable Communications Policy Act of 1984 § 611, 47 U.S.C. § 531. Cable operators traditionally opposed the public access concept because it costs them money. Mueller, *supra* note 6, at 1092; see *supra* notes 27-30 and accompanying text. Access channels force the cable operator to reduce the number of channels that they can sell to paying program vendors. *Id.* at 1093. Access channels also cost cable operators advertising revenues from their local origination programs and steal potential local-origination subscription bases. *Id.*

41. H. REP. NO. 98-934, at 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667.

42. Cable Communications Policy Act of 1984 §§ 611(e), 612(c)(2), 47 U.S.C. §§ 531(e), 532(c)(2).

Access channels are comprised of leased, public, educational, and governmental channels. Mueller, *supra* note 6, at 1059. Access channels do not include local origination programming, even though access programming and local origination programming often appear on the same channel. *Id.* at 1057-58.

Public access channels are those "set aside by the cable operator for exclusive use by local individuals and community groups." *Id.* at 1060 (quoting Bob Ronka, *Cable TV: Preserving Public Access*, 4 L.A. LAW. 8, 9 (1981)); see *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2408-09 (1996) (Kennedy, J., concurring and dissenting) (describing the variety of public functions of such channels).

Educational access channels are community channels that attempt to educate subscribers and citizens of all ages. *Id.*; Mueller, *supra* note 6, at 1066.

Finally, government access channels are those that are used and controlled by the local municipalities. *Id.* These channels allow local officials to effectively reach their constituents and be accessible to their voters. *Id.*; see *Denver Telecomm. Consortium*, 116 S. Ct. at 2408-09 (Kennedy, J., concurring and dissenting). Programming includes explanations of city budgets, codes and ordinances, as well as consumer information spots, and candidate debates. Mueller, *supra* note 6, at 1065.

43. Franchising authorities, by contrast, had the power to exclude any programming which, "in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent, or is otherwise unprotected by the Constitution of the United States." Cable Communications Policy Act of 1984 § 612(h), 47 U.S.C. § 532(h).

Congress can regulate obscene material without hesitation since it is not protected by the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992); *Roth v. United States*, 354 U.S. 476, 485 (1957). A body of work is obscene if it depicts or describes sexual conduct that, when taken as a whole, appeals to a prurient interest in sex. *Miller v. California*, 413 U.S. 15, 24 (1973). It must also portray sexual conduct in a patently offensive manner without having any "serious literary, artistic, political or scientific value." *Id.*

On the other hand, programming that is indecent is deserving of some First Amendment protection. Indecent programming is defined as any material that "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 47 U.S.C. § 532(h); *Denver Telecomm. Consortium*, 116 S. Ct. at 2404 (Ken-

ever, could consider the content of the programming to the extent necessary to establish reasonable prices for the leased access channels.⁴⁴ Cable viewers could only control their own viewing preferences by buying or leasing lockboxes from cable operators.⁴⁵ Due to their lack of editorial control, cable operators were immunized against prosecution under federal, state, and local obscenity laws for any indecent or offensive programming carried on access channels.⁴⁶

b. The Cable Television Consumer Protection and Competition Act of 1992

In 1992, Congress revisited the question of indecent cable programming on leased and PEG access channels. Senator Jesse Helms, supported by Senator Strom Thurmond, was the main proponent behind the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")⁴⁷ which amended the 1984 Cable Act.⁴⁸ According to Senator Helms, the problem with the 1984 Cable Act was "that cable companies are required by law to carry, on leased access channels, any and every program that comes along—no matter how

nedy, J., concurring and dissenting); *see also* Alliance for Community Media v. FCC, 56 F.3d 105, 112-13 (D.C. Cir. 1995) (en banc) (making distinction between indecent and obscene material based on First Amendment principles), *aff'd in part & rev'd in part sub nom.* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) (plurality).

44. Cable Communications Policy Act of 1984 § 612(c)(2), 47 U.S.C. § 532(c)(2). Congress recently amended this section's language, giving cable operators more editorial control. It now reads:

A cable operator shall not exercise any editorial control over any video programming . . . except that a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

Telecommunications Act of 1996 § 506(a), Pub. L. No. 104-104, 110 Stat. 56, 137 (1996) (codified at 47 U.S.C.A. § 532(c)(2) (West Supp. 1997)).

45. Cable Communications Policy Act of 1984 § 624(d)(2)(A), 47 U.S.C. § 544(d)(2).

A lockbox is "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." *Id.* Lockboxes operate through the use of a parental key or a personal identification number. *Playboy Entertainment Group, Inc. v. United States*, 918 F. Supp. 813, 818 (D. Del. 1996).

46. Cable Communications Policy Act of 1984 § 638, 47 U.S.C. § 558.

47. Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C. (1994)).

48. H.R. CONF. REP. NO. 102-862, at 80 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1262. Congress has amended the 1992 Cable Act with the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 47 U.S.C.). The amendments arguably have no constitutional effect on § 10 of the 1992 Cable Act. *See* Respondent's Supplemental Brief, at *1-*4, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996) (plurality) (Nos. 95-124, 95-227), 1996 WL 56498. Therefore, this Note does not discuss the changes made by the Telecommunications Act of 1996 in detail.

offensive and disgusting.”⁴⁹ Senator Helms stated that there were numerous programs on access channels that depicted women and men stripping completely nude, showed oral sex, as well as allowed advertising that promoted incest, bestiality, and rape.⁵⁰ In addition, Senator Coats stressed that “early and sustained exposure” to such materials would cause “significant physical, psychological and social damage to a child.”⁵¹

Members of Congress shared Senator Helms’s and Senator Coats’s convictions as evidenced by the fact that the 1992 Cable Act was approved unanimously by the Senate⁵² and was unopposed by the House in conference.⁵³ The 1992 Cable Act was an attempt to balance the conflicting First Amendment rights of cable operators, cable programmers, and viewers, with the need to enact safeguards to protect children from indecent programming on leased and PEG access channels.⁵⁴ Under the 1984 Cable Act, the only regulation which prevented children from exposure to indecent materials was whatever voluntary self-regulation a parental subscriber put in place.⁵⁵ In contrast, § 10(a) of the 1992 Cable Act permitted cable operators to enforce a written, published policy prohibiting programming on leased access channels that the cable operator believed described or depicted “sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.”⁵⁶ This provision gave cable operators the right to reject indecent material, however, § 10(a) did not require the cable operator to do so.⁵⁷

In order to limit children’s access to indecent programming, Congress also enacted § 10(b). This provision directed the FCC to prescribe rules requiring cable operators who chose to carry indecent programming on leased access channels to place such programming on a separate channel and to block the channel until the subscriber re-

49. 138 CONG. REC. 985 (1992) (statement of Sen. Helms).

50. *Id.*

51. *Id.* at 988 (statement of Sen. Coats).

52. *Id.*

53. H.R. CONF. REP. NO. 102-862, at 80.

54. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 2, 10, 106 Stat. 1460, 1460-63, 1486 (codified as amended in scattered sections of 47 U.S.C. (1994)).

See *supra* note 2 (defining cable operator). Cable programmers are those who produce television programs and then license or sell these programs to cable operators. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994).

55. See *supra* text accompanying note 45.

56. Cable Television Consumer Protection and Competition Act of 1992 § 10(a), 47 U.S.C. § 532(h) (1994).

57. See 138 CONG. REC. 985 (1992) (statement of Sen. Helms).

quested unblocking in writing.⁵⁸ Congress also enacted § 10(c) which required the FCC to promulgate regulations necessary to enable cable operators to prohibit the use of PEG access channels for “any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.”⁵⁹ Finally, Congress enacted § 10(d) which eliminated cable operators’ immunity

58. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(b), 106 Stat. 1460, 1486 (codified at 47 U.S.C. § 532(j) (1994)). In response, the FCC promulgated the following regulation:

Leased access channels.

(a) Notwithstanding 47 U.S.C. 532(b)(2) (Communications Act of 1934, as amended, § 612), a cable operator, in accordance with 47 U.S.C. 532(h) (Cable Consumer Protection and Competition Act of 1992, § 10(a)), may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

(b) A cable operator that does not prohibit the distribution of programming in accordance with paragraph (a) of this section shall place any leased access programming identified by program providers as indecent on one or more channels that are available to subscribers only with their prior written consent as provided in paragraph (c) of this section.

(c) A cable operator shall make such programming available to a subscriber within 30 days of receipt of a written request for access to the programming that includes a statement that the requesting subscriber is at least eighteen years old; a cable operator shall terminate a subscriber’s access to such programming within 30 days from receipt of a subscriber’s request.

(d) A program provider requesting access to a leased access channel shall identify for a cable operator any programming that is indecent as defined in paragraph (g) of this section. Such identification shall be in writing and include the full name, address, and telephone number of the program provider and a statement that the program provider is responsible for the content of the programming. A cable operator may require that such identification be provided up to 30 days to the requested date for carriage. A program provider requesting carriage of “live programming” on a leased access channel that is not identified as indecent must exercise reasonable efforts to insure that indecent programming will not be presented. A cable operator will not be in violation of paragraph (b) of this section if it fails to block indecent programming that is not identified by a program provider as required in paragraph (d) of this section.

47 C.F.R. § 76.701(a)–(d) (1995); see Telecommunications Act of 1996 § 505(a) for a similar blocking provision regarding “channels primarily dedicated to sexually-orientated programming.” Pub. L. No. 104-104, 110 Stat. 56, 136 (to be codified at 47 U.S.C. § 561). In *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772 (D. Del. 1996), *aff’d*, 117 S. Ct. 1309 (1997), the district court refused to grant a preliminary injunction against the enforcement of this provision, finding that Playboy was not likely to succeed on its constitutional claims. *Id.* at 782-92.

59. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486; see 47 U.S.C. note § 531 (1994). Congress has now codified § 10(c) as follows: “A cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section, except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.” Telecommunications Act of 1996 § 506(a), 47 U.S.C.A. § 531(e) (West Supp. 1997).

from criminal and civil liability for obscene programming shown on access channels.⁶⁰

B. Judicial Review Differs According to the Medium of Communication

Given that cable television is a relatively recent phenomena and that it poses unique First Amendment challenges, the Court draws from various First Amendment cases in the print, telephone, and broadcast media when it analyzes issues affecting the cable industry. Depending on the medium used, the Supreme Court and lower courts have applied different levels of scrutiny, different means of analysis, and different interpretations of common and statutory law. Traditionally, the print and telephone media have been analyzed under a strict scrutiny analysis, thereby receiving the most First Amendment protection.⁶¹ The broadcast medium, under the spectrum scarcity rationale, has received the least First Amendment protection.⁶² The cable medium has received mid-range protection, as it is judged under intermediate scrutiny.⁶³

1. Print Cases Analyzed Under Strict Scrutiny

The Court has applied strict scrutiny analysis to the print medium reasoning that newspaper owners' First Amendment rights are paramount to readers', writers', and advertisers' rights.⁶⁴ Under strict scrutiny, when a state imposes a regulation on a private entity, it must have a compelling interest for the regulation, and the regulation must be narrowly tailored to meet that interest.⁶⁵ If a regulation fails this two-prong test, it is unconstitutional.⁶⁶

In *Miami Herald Publishing Co. v. Tornillo*,⁶⁷ the Court invalidated a Florida statute requiring newspapers to provide political candidates with free space to reply to any newspaper articles assailing their personal character.⁶⁸ Implicitly applying a strict scrutiny analysis,⁶⁹ the Court reasoned that any government compulsion impacting what

60. Cable Television Consumer Protection and Competition Act of 1992 § 10(d), 106 Stat. 1460, 1486 (codified at 47 U.S.C. § 558 (1994)).

61. See *infra* Part I.B.1.

62. See *infra* Part I.B.2.

63. See *infra* Part I.B.3.

64. See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 251 (1974).

65. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 216-17, 237 (1995); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

66. See, e.g., *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 19 (1986) (plurality).
67. 418 U.S. 241 (1974).

68. *Id.* at 244-45.

newspapers publish is unconstitutional.⁷⁰ The Court stated that “the power of a privately owned newspaper to advance its own political, social, and economic views was bound by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and second, the journalistic integrity of its editors and publishers.”⁷¹ The Court rejected *Tornillo*’s argument that the government has an obligation to ensure that a wide range of views reach the public.⁷² The Court also rejected *Tornillo*’s argument that newspapers, having consolidated in number and grown into big businesses, are enormously powerful and influential and are therefore deserving of some governmental regulation.⁷³

In the *Tornillo* decision, the Court distinguished the print medium from the broadcast medium by explaining that newspapers are not subject to the finite technological limitations of space and time that confront broadcasters.⁷⁴ There are no insurmountable expenses or technological impediments inhibiting people from starting their own publications to express the views that another publication chooses not to publish.⁷⁵ The Court concluded: “The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment.”⁷⁶ In addition, the Court reasoned that from an economic standpoint, a single newspaper cannot allow infinite expansion of its column space to accommodate the replies mandated by the Florida statute.⁷⁷

Relying on the decision in *Tornillo*, the Court held in *Pacific Gas & Electric Co. v. Public Utilities Commission*⁷⁸ that the First Amendment was violated when the government required a private party to disseminate the views of those with whom the party disagreed.⁷⁹ Ap-

69. See *id.* at 259 (White, J., concurring). The Court stated that the First Amendment constructs “a virtually insurmountable barrier” on any governmental attempts to tamper with freedom of the press. *Id.*

70. *Id.* at 258.

71. *Id.* at 255 (citing *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117 (1973) (plurality)).

72. *Id.* at 247-48.

73. *Id.* at 248-50.

74. *Id.* at 256-57.

75. *Id.*

76. *Id.* at 258.

77. *Id.* at 256-57. “A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.” *Id.* at 258.

78. 475 U.S. 1 (1986) (plurality).

79. *Id.* at 20. The Public Utilities Commission compelled the Pacific Gas & Electric Company to place a newsletter containing views of a third party in its billing envelopes. *Id.* at 5-6. The

plying strict scrutiny, the plurality reasoned that third persons should not be given the right to insert their own messages into a private utility's bills over the utility's objections.⁸⁰ According to the Court, such a right would force the utility to choose between appearing to agree or responding negatively.⁸¹ This is contrary to the principle that the "choice to speak carries with it the choice of what not to say."⁸²

2. Telephone Cases Analyzed Under Strict Scrutiny

The Court typically has applied strict scrutiny when analyzing telephone cases involving common carriers.⁸³ In *Sable Communications, Inc. v. FCC*,⁸⁴ the Court held that banning access to telephone messages that were indecent, but not obscene, far exceeded what was necessary to limit minors' access to such messages and was unconstitutional under the First Amendment.⁸⁵ Using strict scrutiny, the Court reasoned that prohibiting dial-a-porn services was not a narrowly tailored effort to serve the compelling interest of protecting minors from exposure to indecent telephone messages.⁸⁶ The Court distinguished this case from the time, place, and manner restriction in *FCC v. Pacifica Foundation*⁸⁷ because *Sable* involved a complete ban on speech.⁸⁸ Furthermore, the Court differentiated *Sable* from *Pacifica* because dial-a-porn service required the listener to take affirmative steps to receive the indecent phone messages, whereas indecent broadcasting intrudes on the privacy of the home without prior warning as to the content of the materials.⁸⁹

Court held that this penalized the expression of particular points of view by the utility and forced the utility to alter its speech "to conform with an agenda which it did not set." *Id.* at 34. These impermissible effects on the utility's First Amendment rights were not remedied by the fact that it was determined by the Commission that it was the ratepayers, not the utility, which owned the extra space in the billing envelope. *Id.* at 17-19.

80. *Id.* at 19-21. The plurality conceded that the State's interest in fair and effective utility regulation may be compelling, however they could find "no substantially relevant correlation between the governmental interest asserted and the State's effort' to compel appellant to distribute [appellee's] speech in [the utility company's billing] envelopes." *Id.* at 19 (citations omitted).

81. *Id.* at 15.

82. *Id.* at 11.

83. See, e.g., *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989). A common carrier is any carrier that the law requires to convey passengers or property without refusal if the approved fare or charge is paid. BLACK'S LAW DICTIONARY 275 (6th ed. 1990).

84. 492 U.S. 115 (1989).

85. *Id.* at 131.

86. *Id.*

87. 438 U.S. 726 (1978) (plurality); see *infra* notes 123-40 and accompanying text.

88. *Sable*, 492 U.S. at 127.

89. *Id.* at 127-28.

Two years later in *Information Providers' Coalition v. FCC*,⁹⁰ the Ninth Circuit applied strict scrutiny to state regulation of the telephone industry.⁹¹ Unlike the complete ban in *Sable*, the court held that reverse blocking was a technically feasible and an effective way of limiting minors' access to dial-a-porn services.⁹² The court stated that the provisions for dial-a-porn access are in effect "no different from requesting access to a periodical subscription, requesting admittance at a box office to an adult movie, or requesting a copy of an adult magazine kept under the counter in a plain brown wrapper at the convenience store."⁹³ The court reasoned that there was no "prior restraint" of speech in requiring users of dial-a-porn to make advance requests for access, or in requiring providers to notify telephone carriers that their material is sexually oriented.⁹⁴ The court also reasoned that telephone companies are private companies, not state actors, and thus are not obligated to restrict, terminate, or continue the services of specific subscribers.⁹⁵ Constitutionally, a telephone company can terminate all service to dial-a-porn providers.⁹⁶

Similarly, in *Dial Information Services Corp. v. Thornburgh*,⁹⁷ the Second Circuit upheld a statute which provided a safe harbor defense for dial-a-porn service providers if they complied with written telephone company pre-subscription procedures or engaged in independent billing and collection procedures.⁹⁸ According to the court:

[A] child may have suffered serious psychological damage from contact with dial-a-porn before the child's parents may become aware from a monthly telephone bill that there has been access to an indecent message. Common sense dictates that a presubscription [sic] requirement, like requirements for payment by credit card before a message is transmitted, for use of an authorized access or identification card before transmission, and for a descrambling device for

90. 928 F.2d 866 (9th Cir. 1991).

91. *Id.* at 878.

92. *Id.* at 869, 879. Reverse blocking requires that a subscriber write in to request dial-a-porn service ("opt-in"), whereas voluntary blocking requires that a person write in to request that their residence not receive access to dial-a-porn ("opt out"). *Id.* at 869.

93. *Id.* at 878.

94. *Id.*

95. *Id.* at 877.

96. *Id.*

97. 938 F.2d 1535 (2d. Cir. 1991).

98. *Id.* at 1539-44.

A common carrier . . . shall not, to the extent technically feasible, provide access to a [dial-a-porn message] from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge . . . that the carrier remits, in whole or in part, to the provider

Id. at 1539 (quoting 47 U.S.C. § 223(c)(1) (Supp. II 1990)).

scrambled messages, is more likely to achieve the goal sought than blocking after one or more occasions of access. It always is more effective to lock the barn *before* the horse is stolen.⁹⁹

Even though voluntary blocking alternatives were less economically restrictive on providers, voluntary blocking was less effective in meeting the goal of shielding minors from indecent communications.¹⁰⁰ The means of a restriction must meet the goal that the legislation is trying to achieve.¹⁰¹

3. *Broadcast Cases Analyzed Under Spectrum Scarcity Rationale and Strict Scrutiny*

The broadcast industry has typically received less First Amendment protection than either the print or the telephone medium. The Court has applied the fairness doctrine¹⁰² to the broadcast medium, reasoning that a lower level of scrutiny is justified because of spectrum scarcity.¹⁰³ Under this rationale, the Court has reasoned that the rights of viewers and listeners are paramount to the rights of broadcasters.¹⁰⁴ For example, in *Red Lion Broadcasting Co. v. FCC*,¹⁰⁵ the Court faced a fact pattern similar to that in *Tornillo*,¹⁰⁶ but held that the fairness doctrine was constitutional as applied to the broadcast medium.¹⁰⁷ The Court held that it was constitutional to require radio stations to furnish persons attacked on the air with a tape, a transcript, or a summary of the broadcast, as well as to provide the person equal time to respond, free of charge.¹⁰⁸ The Court reasoned:

[T]he reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from

99. *Id.* at 1542 (emphasis added).

100. *Id.*

101. *Id.* at 1541; accord *Information Providers' Coalition*, 928 F.2d at 879.

102. The fairness doctrine not only requires broadcasters to cover public issues, but it also requires them to do so fairly by presenting both sides of the debate. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369-70 (1969); see generally Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 154-57 (discussing the administrative and legislative burial of the fairness doctrine).

103. The spectrum scarcity rationale is based on the premise that there are more would-be broadcasters than there are frequencies available in the electromagnetic spectrums. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994). "[B]roadcast frequencies constitute a scarce resource whose use could be regulated and rationalized only by the Government to avoid chaos and promote a fairness interest." *Red Lion*, 395 U.S. at 376.

104. *Red Lion*, 395 U.S. at 390.

105. 395 U.S. 367 (1969).

106. See *supra* text accompanying notes 67-77.

107. *Red Lion*, 395 U.S. at 371-75; see also Lee, *supra* note 38, at 571-76 (finding that *Red Lion* is a very limited decision).

108. *Red Lion*, 395 U.S. at 400-01.

the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the radio spectrum is utilized in the present state of commercially acceptable technology.¹⁰⁹

The Court justified its holding by declaring broadcast frequencies were a scarce resource which could only be fairly regulated and rationed by the government.¹¹⁰

In contrast, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*¹¹¹ the Court reasoned that the rights of the public are not paramount to the rights of broadcasters.¹¹² In that case, the Court held that neither the public interest nor the fairness doctrine required broadcasters to accept paid editorial advertisements.¹¹³ The Court reasoned that Congress had consistently rejected efforts to impose rights of access for all persons wishing to speak out on public issues.¹¹⁴ The Court stated that "it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents."¹¹⁵ The Court reasoned that journalistic tradition and experience trumps individual private whims to have specific items advertised or covered by the media.¹¹⁶

Similarly, in *FCC v. WNCN Listeners Guild*,¹¹⁷ the Court held that the fairness doctrine did not require the FCC to impede on broadcasters' editorial discretion.¹¹⁸ In that case, the Court upheld an FCC policy of not reviewing past or anticipated changes in a station's entertainment programming when ruling on the station's license application for renewal or transfer.¹¹⁹ The Court held that this policy did not conflict with the First Amendment rights of listeners "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."¹²⁰ Rather, the Court stated that the policy "enhanced

109. *Id.* at 387-88.

110. *Id.* at 376. The Court felt that if the allocation of frequencies was left entirely to private parties, chaos would result because of the "cacophony of competing voices, none of which could be clearly and predictably heard." *Id.*

111. 412 U.S. 94 (1973).

112. *Id.* at 124.

113. *Columbia Broad.*, 412 U.S. at 124-25.

114. *Id.*

115. *Id.* at 120.

116. *Id.* at 125.

117. 450 U.S. 582 (1981).

118. *Id.* at 600.

119. *Id.*

120. *Id.* at 604.

First Amendment values by promoting 'the presentation of vigorous debate of controversial issues of importance and concern to the public.'"¹²¹ The Court reasoned that the FCC's policy furthered the public interest by allowing market forces to promote diversity in radio programming.¹²²

While the Court employed the fairness doctrine and spectrum scarcity rationale in *Red Lion* and the fairness doctrine in *Columbia Broadcasting* and *WNCN*, the Court adjudicated *FCC v. Pacifica Foundation*¹²³ without mentioning either doctrine or a particular level of scrutiny.¹²⁴ In *Pacifica*, a plurality of the Court upheld an FCC ban on radio broadcasts of indecent material during certain periods.¹²⁵ The Court concluded that a twelve-minute monologue by George Carlin entitled "Filthy Words" was patently offensive, though not necessarily obscene.¹²⁶ The plurality found that the monologue should only be broadcast at times of the day or evening when children were less likely to be in the listening audience.¹²⁷

In justifying its ban, the plurality focused on four innate characteristics of the broadcast medium and their relationship to children.¹²⁸ First, the broadcast medium maintains a "uniquely pervasive presence in the lives of all Americans."¹²⁹ Second, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."¹³⁰ Third, "because the broadcast audience is constantly tuning in and out, prior warning cannot completely protect the listener or viewer from unexpected program content."¹³¹ Fourth, once a child has

121. *Id.* (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)).

122. *Id.*

123. 438 U.S. 726 (1978) (plurality).

124. *Id.*

125. Indecency is defined as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Action for Children's Television v. FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995) (citation omitted).

126. *Pacifica*, 438 U.S. at 744-51.

127. *Id.* at 749-50. "[T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes [or depicts] . . . sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Citizens Complaint Against Pacifica Found.*, 56 F.C.C.2d 94, 98 (1975); see generally Jay A. Gayoso, Comment, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves*, 43 U. MIAMI L. REV. 871, 876-95 (1988) (discussing First Amendment treatment of indecency in various communication media).

128. *Pacifica*, 438 U.S. at 748-49.

129. *Id.* at 748.

130. *Id.*

131. *Id.*

turned on the radio and has heard an indecent broadcast, the damage has been done and is possibly irreparable.¹³² Thus, without referring to a traditional First Amendment scrutiny level, the plurality used a combination of the children's exposure to indecency and the pervasive nature of radio to severely limit broadcasters' First Amendment protection.¹³³

In contrast to *Pacifica*, the Court of Appeals for the District of Columbia Circuit used strict scrutiny to adjudicate a regulation which applied to broadcast television in *Action For Children's Television v. FCC*.¹³⁴ In that case, the court upheld the constitutionality of § 16(a) of the 1992 Cable Act which bans indecent material from being shown on broadcast television between 6:00 a.m. and midnight.¹³⁵ Using a strict scrutiny analysis and considering the "unique context of the broadcast medium,"¹³⁶ the court found that the complementary interests of protecting the well-being of children and supporting parental supervision of children were compelling.¹³⁷ The court also found that channeling indecent broadcasts between the hours of midnight and 6:00 a.m. was narrowly tailored and did not unduly burden First Amendment rights.¹³⁸ The court reasoned that the ban was not overly restrictive because it did not prevent parents who may want to expose their children to indecent materials from doing so by using pay-per-view cable channels, as well as video and audio tapes.¹³⁹ Additionally, the court stated that this programming ban was manifestly different from one which could occur on cable television because cable subscribers affirmatively elect to pay for cable service, whereas broadcast television viewers do not.¹⁴⁰

132. *Id.* at 748-50.

To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Id. at 748-49. The plurality further reasoned that the time regulation in *Pacifica*, which limited the broadcast to times when kids were not around, is justified because "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749-50.

133. *Id.* at 748-51.

134. 58 F.3d 654, 660-67 (D.C. Cir. 1995) (plurality), *cert. denied*, 116 S. Ct. 701 (1996).

135. *Id.* at 656. Stations that go off the air before midnight may begin to air the otherwise objectionable programming at 10:00 p.m. *Id.*

136. *Id.* at 660.

137. *Id.* at 660-61, 663.

138. *Id.* at 667.

139. *Id.* at 663.

140. *Id.* at 660.

4. Cable Cases Analyzed Under Intermediate Scrutiny

In contrast to the strict scrutiny analysis the Supreme Court used in print and telephone media decisions and the spectrum scarcity rationale used in broadcast medium decisions, the Court used intermediate scrutiny to adjudicate *Turner Broadcasting Systems, Inc. v. FCC*.¹⁴¹ In that case, the Court held that the must-carry provisions of the 1992 Cable Act, which required cable television systems to devote a portion of their channels to transmission of local and public broadcast stations,¹⁴² were content-neutral restrictions that incidentally burdened speech and, thus, were subject to intermediate scrutiny.¹⁴³

To withstand a constitutional challenge, intermediate scrutiny requires a content-neutral regulation to satisfy three criteria: (1) the regulation must further an important or substantial government interest; (2) it must be unrelated to the suppression of speech; and (3) it must be no greater than necessary to further that interest.¹⁴⁴ Applying this test, the Court found that the must-carry regulations were sufficiently tailored to serve the important governmental interests of preserving the benefits of free broadcast television, "promoting the widespread dissemination of information from a multiplicity of sources," and promoting fair competition in television.¹⁴⁵ The Court then remanded the case to the District Court for the District of Columbia, finding that material issues of fact existed as to whether there were less restrictive means to achieve the aforementioned government interests.¹⁴⁶

In applying the more exacting scrutiny used in *Turner Broadcasting*, rather than the relaxed tests used in *Red Lion*, *Columbia Broadcasting*, and *WNCN*, the Court focused on the innate differences between broadcast television and cable television¹⁴⁷ and the content-neutral

141. 512 U.S. 622, 661-62 (1994). Under intermediate scrutiny, a regulation will be upheld if it is substantially related to the achievement of an important government interest. *United States v. Virginia Military Inst.*, 116 S. Ct. 2264, 2275 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

142. Cable Television Consumer Protection and Competition Act of 1992 §§ 4(a), 5(a), 47 U.S.C. §§ 534(a), 535(a) (1994). Section 4(a) requires a cable operator to carry "local commercial" television station signals. *Id.* § 4(a), 47 U.S.C. § 534(a). Section 5(a) requires a cable operator to carry local public broadcast stations, for example, "noncommercial educational television stations." *Id.* § 5(a), 47 U.S.C. § 535(a).

143. *Turner Broad.*, 512 U.S. at 662.

144. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

145. *Turner Broad.*, 512 U.S. at 662; *see also* H.R. REP. NO. 102-628, at 28, 63 (1992) (discussing the purpose of the regulations and substantial governmental interests served); S. REP. NO. 102-92, at 58-59 (1991) (concluding that the substantial nature of the three government interests upon which regulations are based "cannot be seriously questioned").

146. *Turner Broad.*, 512 U.S. at 664-69.

147. *Id.* at 627-28. Broadcast and cable television use different technologies to reach viewers. *Id.* at 627. Broadcast radiates electromagnetic signals from a central transmitting antenna and

nature of the must-carry regulations.¹⁴⁸ The Court reasoned that cable television does not suffer from the inherent programming limitations of broadcast television, given cable's rapid advances in fiber optics and digital compression technology.¹⁴⁹ It stated that "there may be no practical limitation on the number of speakers who may use the cable medium."¹⁵⁰ The Court found that the must-carry regulations were content neutral because they distinguish between speakers in the television programming market based only upon the manner in which programmers transmit messages to viewers.¹⁵¹ According to the Court, must-carry regulations do not discriminate between the content of the messages of cable operators and broadcasters.¹⁵²

The Court of Appeals for the District of Columbia Circuit also used intermediate scrutiny to adjudicate a freedom of speech issue in the cable context in *Time Warner Entertainment Co. v. FCC*.¹⁵³ In that case, the court found that the leased and PEG access provisions of the 1984 Cable Act did not violate the First Amendment under an intermediate scrutiny test.¹⁵⁴ The court reasoned that these provisions passed constitutional muster because "'promoting widespread dissemination of information from a multiplicity of sources' and 'promoting

these signals have the capability of being captured by all televisions within the antenna's range. *Id.* In contrast, cable uses physical, point-to-point connections between a transmission facility and an individual subscriber's television set. *Id.* at 627-28. Cable's connection to individual television sets is similar to telephone companies' use of cable or optical fibers strung above ground or buried in ducts to reach individual subscribers' telephones. *Id.* at 628; *see also* J. GOODALE, *ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION* § 5.05[2] (1988).

148. *Turner Broad.*, 512 U.S. at 643-52. Content-neutral regulations do not distinguish between speakers based on the content of their speech. *Id.* at 643. Rather, content-neutral regulations distinguish between speakers based on the manner in which the speech is disseminated to the listener or viewer. *Id.* at 645. Content-based regulations are those which the government implements because of its agreement or disagreement with a message. *Id.* at 642 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

149. *Id.* at 638-39.

150. *Id.* at 639; *see also* *Turner Broad. v. FCC*, 910 F. Supp. 734, 746-47 (D.D.C. 1995) (discussing an expert's prediction that digital compression technology will "fuel the expansion of channel capacity"). The National Cable Television Association ("NCTA") reported that the development of fiber optic cable allows the existing coaxial cable to enable every home to carry 100-200 channels. *Id.* at 745. The Association further reported that the twenty largest multiple system operators already had begun installation of fiber within their systems, with the amount of fiber installed by these companies increasing 400% percent since 1988. *Id.* The association predicts that "consumers who today can choose from dozens of cable channels soon will have a video menu of well over 100 options." *Id.* (citations omitted).

151. *Turner Broad.*, 512 U.S. at 645-46. The must-carry regulations are content neutral in application and do not force cable operators to alter their own messages to respond to the broadcast programming that they must carry. *Id.* at 645-47.

152. *Id.* at 645-46.

153. 93 F.3d 957, 966-67 (D.C. Cir. 1996), *reh'g denied*, 105 F.3d 723 (D.C. Cir. 1997).

154. *Id.* at 969-71.

fair competition in the market for television programming'” were important governmental interests unrelated to the suppression of speech.¹⁵⁵ The court refused to apply strict scrutiny because it viewed the leased and PEG access provisions of the 1984 Cable Act as content-neutral regulations that did not compel speakers to distribute speech bearing a particular message.¹⁵⁶ The dissent argued that leased and PEG access regulations are content based and favored the content of a cable programmer's speech over that of a cable operator.¹⁵⁷

Although the Supreme Court formulated the rule that intermediate scrutiny would be used in adjudicating First Amendment issues arising in the cable medium, and lower courts adhered to this rule, it was short-lived. In *Denver Telecommunications Consortium*, the Supreme Court departed from intermediate scrutiny and applied a nontraditional, uncertain, case-by-case analysis in adjudicating a free-speech issue in the cable medium.

II. SUBJECT OPINION

A. *The Appellate Court's En Banc Opinion—§§ 10(a), 10(b), and 10(c) Held Constitutional*

In *Alliance for Community Media v. FCC*,¹⁵⁸ the Court of Appeals for the District of Columbia Circuit heard this case en banc and held that §§ 10(a), 10(b), and 10(c) of the 1992 Cable Act were constitutional under the First Amendment.¹⁵⁹ The full court held that the rights of cable operators to prohibit indecent programming on leased or PEG access channels under §§ 10(a) and 10(c) did not constitute state action to which the First Amendment applied.¹⁶⁰ The court stated that the statute did not command cable operators to prohibit

155. *Id.* at 969 (quoting *Turner Broad.*, 512 U.S. at 662).

156. *Id.* at 971-73.

157. *Id.* at 983-85.

158. 56 F.3d 105 (D.C. Cir. 1995) (en banc), *aff'd in part & rev'd in part sub nom.* *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996) (plurality). Petitioners, a number of cable programmers and organizations of listeners and viewers, filed petitions for review in the Court of Appeals for the District of Columbia Circuit regarding the Commission's regulations implementing the statutory provisions of § 10. *Id.* at 110. They stated that the implementing provisions violated their rights to free speech under the First Amendment. *Id.* The Court of Appeals for the District of Columbia Circuit invalidated §§ 10(a) and 10(c) stating that the provisions were attributable to the federal government as "state action." *Id.* The court remanded the issue of the constitutionality of § 10(b)'s segregation and blocking scheme for leased access channels to the FCC for further consideration in light of its invalidation of §§ 10(a) and 10(c). *Id.* The Court of Appeals for the District of Columbia Circuit vacated the earlier opinion on February 16, 1994 and reheard the case en banc. *Id.*

159. *Id.* at 123, 129.

160. *Id.* at 116.

indecent programming.¹⁶¹ Instead, the court explained that the statute gave cable operators a choice.¹⁶² They could either carry indecent programs on their access channels or they could not.¹⁶³ The choice was theirs to make—not the government's.¹⁶⁴ The court also concluded that the statute did not significantly encourage a cable operator to ban indecent programming to the extent that state action must be found.¹⁶⁵ The court reasoned that “[m]ere approval of or acquiescence in the initiatives of a private party’ . . . ‘cannot justify holding the State responsible for those initiatives.’”¹⁶⁶ The court also determined that leased and PEG access channels were not public forums since they were not owned by the government.¹⁶⁷

The court, however, found that § 10(b)'s segregation and blocking scheme constituted state action because it was the least restrictive means of accommodating two competing interests: the interest in limiting children's exposure to indecency and the interest in allowing adults access to such material.¹⁶⁸ The court found that voluntary use of lockboxes was not an effective alternative to restricting a cable operator's editorial discretion.¹⁶⁹ Furthermore, because leased access channels are not controlled by a single editor, the potential that children would be inadvertently exposed to indecent material was great since parents were responsible for continually activating and deactivating their lockboxes.¹⁷⁰ The only other alternative to preventing human error and inadvertent exposure to children was permanent installation of a lockbox and permanent loss of access to leased access programming.¹⁷¹ Thus, the court found that the regulation was constitutional under a strict scrutiny analysis.¹⁷²

B. The Supreme Court's Opinion

By a seven to two vote, the Supreme Court found § 10(a) of the 1992 Cable Act constitutional, whereas §§ 10(b) and 10(c) were held

161. *Id.*

162. *Id.*

163. *Id.* at 116-17

164. *Id.*

165. *Id.* at 117-19.

166. *Id.* at 118 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)).

167. *Id.* at 122-23.

168. *Id.* at 123-29.

169. *Id.* at 125.

170. *Id.*

171. *See id.*

172. *Id.* at 123-25.

unconstitutional by six to three and five to four votes respectively.¹⁷³ The following subparts discuss the various opinions of the Court. The discussion is divided according to the three sections of the 1992 Cable Act at issue in *Denver Telecommunications Consortium*.

1. *Section 10(a)—Cable Operators' Regulation of Indecency on Leased Access Channels Held Constitutional*

Section 10(a) permitted cable operators to enforce a written, published policy prohibiting programming that a cable operator believed described or depicted sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards on leased access channels.¹⁷⁴ Writing for the plurality on this issue, Justice Breyer, joined by Justices Stevens, O'Connor, and Souter, concluded that § 10(a) was consistent with the First Amendment.¹⁷⁵ Justices Stevens and Souter also wrote separate concurrences.¹⁷⁶ Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, concurred in the judgment.¹⁷⁷ Justice Kennedy, joined by Justice Ginsburg, were the only dissenters.¹⁷⁸

a. *Section 10(a)—Plurality Opinion*

Because of the complex issues involved in balancing the rights of the cable operator, the cable programmer, and the viewing public, as well as the need to protect children from indecent material, Justice Breyer departed from traditional First Amendment analysis in deciding that § 10(a) is constitutional.¹⁷⁹ The plurality refused to apply a traditional First Amendment analysis to leased access channels, reasoning there were no definitive analogies to print, broadcast, or common carrier cases that allowed it "to declare a rigid single standard, good for now and for all future media and purposes."¹⁸⁰ The plurality, unlike Justice Kennedy, refused to analyze this section under the public forum doctrine.¹⁸¹ Furthermore, because of the rapid changes tak-

173. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2380-81 (1996) (plurality).

174. See *supra* note 56 and accompanying text.

175. See *Denver Telecomm. Consortium*, 116 S. Ct. at 2378.

176. *Id.* at 2398 (Stevens, J., concurring); *id.* at 2401 (Souter, J., concurring).

177. *Id.* at 2419 (Thomas, J., concurring and dissenting).

178. *Id.* at 2404 (Kennedy, J., concurring and dissenting).

179. *Id.* at 2384-87.

180. *Id.* at 2385.

181. *Id.* at 2388-89. Public forums are public property of a limited or unlimited character that the State opens up for expressive activity by part or all of the public. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Public forums do not have to be physical gathering places. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819,

ing place in the law, as well as in the technological and industrial structure of the telecommunication industry, the plurality felt it “unwise and unnecessary” to definitively pick one analogy or one specific standard.¹⁸²

Using “close judicial scrutiny,” the plurality found that § 10(a) appropriately addressed the threat that indecency on leased access channels posed to children without imposing an “unnecessarily great restriction” on free speech.¹⁸³ The plurality advanced four reasons why it found § 10(a) was a “sufficiently tailored response to an extraordinarily important problem.”¹⁸⁴ First, it reasoned that protecting children is a compelling interest that the Court had often recognized.¹⁸⁵ Second, the plurality reasoned that but for the 1984 Cable Act, Congress would not have any control over a cable operator’s ability to regulate its own channels.¹⁸⁶ Third, it analogized § 10(a) to the “indecent” radio broadcast at issue in *Pacifica*.¹⁸⁷ The plurality reasoned that this choice to ban was permissible primarily because “broadcasting is uniquely accessible to children,” and the broadcast media has “established a uniquely pervasive presence in the lives of all Americans.”¹⁸⁸ Fourth, the plurality reasoned that § 10(a)’s permissive nature restricted speech less than the time, place, and manner restriction in *Pacifica*.¹⁸⁹ According to the plurality, the provision does create a risk that a program will not appear; however, it reasoned that risk is not the same as the certainty that accompanies a governmental ban.¹⁹⁰ Section 10(a)’s permissive and flexible nature does not

830 (1995) (applying forum principles to “metaphysical” student activity funding system). Public forums are not limited to property owned by the government. See *Cornelius v. NAACP*, 473 U.S. 788, 801 (1985) (focusing forum analysis on access sought by speakers including physical locations or non-physical communication systems).

182. *Denver Telecomm. Consortium*, 116 S. Ct. at 2385.

183. *Id.*

184. *Id.* at 2385-86.

185. *Id.* at 2386. The Court has recognized that “protecting the physical and psychological well-being of minors” is a compelling interest. *Id.* at 2429 (Thomas, J., concurring and dissenting) (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)). It also reasoned that this interest “extends to shielding minors from the influence of [indecent speech] that is not obscene by adult standards.” *Id.*

186. *Id.* at 2386.

187. *Id.*

188. *Id.* (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (plurality)). Sixty-three percent of American households subscribe to cable. *Id.* (citation omitted). On average, cable households spend more of their day watching television than persons without cable service. *Id.* (citation omitted). “Children spend more time watching television and view more channels than do their parents, whether their household subscribes to cable or receives television over the air.” *Id.* (citation omitted).

189. *Id.* at 2387.

190. *Id.*

require cable operators to ban broadcasts, but rather to rearrange broadcast times to better fit the wants of adult audiences, while lessening the chances that children will gain access to harmful material.¹⁹¹

Justice Stevens concurred in the judgment that § 10(a) is constitutional.¹⁹² He wrote separately to stress that the differences between leased and PEG access channels are critical.¹⁹³ He emphasized that leased access channels are a creation of the government, while PEG access channels are a product of contracts forged between cable operators and local cable franchising authorities.¹⁹⁴ As a result, PEG access channels are subject to a variety of local content controls, apart from federal controls, that leased access channels do not encounter.¹⁹⁵ Furthermore, Justice Stevens reasoned that returning control over indecent programming to cable operators pursuant to § 10(a) treats individual programmers no differently than programmers on any other channel.¹⁹⁶ Returning control on leased, but not on PEG access channels, in his opinion, was not viewpoint discriminatory.¹⁹⁷

Justice Souter also concurred in the judgment that § 10(a) is constitutional.¹⁹⁸ He wrote separately to stress that the Court should not use a categorical First Amendment analysis in this case.¹⁹⁹ He found the technological and regulatory state of flux enveloping cable mandated against a rule-based analysis and favored a "protean" approach in this case.²⁰⁰

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, concurred in the judgment that § 10(a) is constitutional.²⁰¹ Justice Thomas reasoned that the cable medium is analogous to the print medium and should be adjudicated under strict scrutiny.²⁰² In his opinion, after *Turner Broadcasting*, the Court made it clear that the rights of the cable operator are paramount to the cable programmer and viewers.²⁰³ Justice Thomas reasoned that viewers have a general

191. *Id.*

192. *Id.* at 2398 (Stevens, J., concurring).

193. *Id.*

194. *Id.* at 2399-400.

195. *Id.* at 2399.

196. *Id.*

197. *Id.*

198. *Id.* at 2401-03 (Souter, J., concurring).

199. *Id.* at 2401-02.

200. *Id.* at 2402.

201. *Id.* at 2419 (Thomas, J., concurring and dissenting).

202. *Id.* at 2421-22.

203. *Id.* at 2421 (discussing *Turner Broadcasting's* rejection of the *Red Lion* fairness doctrine).

right to see what a willing operator transmits, but under *Tornillo*²⁰⁴ and *Pacific Gas*,²⁰⁵ they do not have the right to force an unwilling speaker to speak.²⁰⁶ Furthermore, in criticizing the plurality's "balancing" of the "complex interests" inherent in the constitutionality of § 10(a), Justice Thomas stated that a programmer ordinarily does not have a protected right to transmit indecent programming, so transmission should not acquire constitutional significance on leased and PEG access channels.²⁰⁷

b. Section 10(a)—Dissenting Opinion

Justice Kennedy, joined by Justice Ginsburg, found § 10(a) unconstitutional.²⁰⁸ Justice Kennedy strongly criticized the plurality opinion for its departure from traditional First Amendment analysis.²⁰⁹ He reasoned that even though the plurality would not apply strict scrutiny, they settled for synonyms.²¹⁰ Justice Kennedy criticized the plurality for treating public forums, broadcasters, and common carriers as mere labels, rather than as categories with settled legal significance, stating:²¹¹

Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day. . . . [Standards] also provide notice and fair warning to those who must predict how the courts will respond to attempts to suppress their speech.²¹²

Justice Kennedy reasoned that when there is a threat to free speech in the context of emerging technology, a disciplined First Amendment analysis should be applied.²¹³ He found the novel case-by-case approach that the plurality used to be counterproductive.²¹⁴ Additionally, Justice Kennedy viewed § 10(a) as a straightforward First Amendment issue of whether the government could deprive speakers of protections afforded all others on the basis of the content of their speech under a strict scrutiny analysis.²¹⁵ Reasoning that the govern-

204. See *supra* notes 67-77 and accompanying text.

205. See *supra* notes 78-82 and accompanying text.

206. *Denver Telecomm. Consortium*, 116 S. Ct. at 2421 (Thomas, J., concurring and dissenting).

207. *Id.* at 2422.

208. *Id.* at 2404 (Kennedy, J., concurring and dissenting).

209. *Id.*

210. *Id.* at 2406-07.

211. *Id.* at 2411-15.

212. *Id.* at 2406.

213. *Id.*

214. *Id.*

215. *Id.* at 2405.

ment may not “reduce the adult population . . . to [viewing] only what is fit for children,” Justice Kennedy held that the regulation did not survive strict scrutiny.²¹⁶

2. *Section 10(b)—Segregation and Blocking Regulations on Leased Access Channels Held Unconstitutional*

Section 10(b) of the 1992 Cable Act required cable operators to segregate and block any patently offensive programming appearing on leased access channels and to unblock it within thirty days of a subscriber's written request to view it.²¹⁷ A majority of the Court found § 10(b) of the 1992 Cable Act unconstitutional.²¹⁸ The Court's analysis of § 10(b) was the only part of the opinion to which a majority of all the judges subscribed.²¹⁹ Justice Breyer, joined by Justices Souter, Stevens, Kennedy, O'Connor, and Ginsburg, found § 10(b) to be unconstitutional.²²⁰ Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented.²²¹

a. *Section 10(b)—Majority Opinion*

A majority of the Court found that § 10(b) of the 1992 Cable Act violated the First Amendment.²²² In evaluating § 10(b), the Court adhered to a traditional First Amendment strict scrutiny analysis, even though it did not use a similar analysis when adjudicating §§ 10(a) and 10(c).²²³ While the Court found the need to protect children from indecent programming compelling, it found that the segregation and blocking requirements of § 10(b) were not the least restrictive means by which to accomplish this goal.²²⁴ The Court found that lockboxes,²²⁵ v-chips,²²⁶ and the Telecommunications Act of 1996's

216. *Id.* at 2417 (quoting *Butler v. Michigan*, 32 U.S. 380, 383 (1957)).

217. *See supra* notes 58-59 and accompanying text.

218. *Denver Telecomm. Consortium*, 116 S. Ct. at 2381, 2394.

219. *Id.* at 2394.

220. *Id.*

221. *Id.* at 2419 (Thomas, J., concurring and dissenting).

222. *Id.* at 2394.

223. *See supra* Part II.B.1.a; *infra* Part II.B.3.a.

224. *Denver Telecomm. Consortium*, 116 S. Ct. at 2392.

225. *See supra* text accompanying note 45.

226. V-chips are devices that will automatically be able to identify and block explicit or violent programs. *Denver Telecomm. Consortium*, 116 S. Ct. at 2392. In the future all manufacturers will have to insert v-chips into televisions larger than thirteen inches. Telecommunications Act of 1996 § 551(c), (e)(2), Pub. L. No. 104-104, 110 Stat. 56, 141-42 (to be codified at 47 U.S.C. 303(x)); *see also* Howard M. Wasserman, *Second-Best Solution: The First Amendment, Broadcast Indecency and the V-Chip*, 91 Nw. U. L. Rev. 1190, 1221 (1997).

scrambling provisions²²⁷ were less restrictive than the segregation and blocking requirements of § 10(b).²²⁸ Although the majority opinion agreed with the government's arguments that v-chips and lockboxes did not totally eliminate the problem of children gaining access to indecent material, it stated that "[n]o provision . . . short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to 'justify reducing the adult population . . . to . . . only what is fit for children.'"²²⁹ In addition, the Court found the provision that required subscribers to write to their cable operator thirty days in advance of wanting to receive indecent programming to be overly restrictive.²³⁰

b. Section 10(b)—Dissenting Opinion

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, found § 10(b) constitutional.²³¹ Justice Thomas readily acknowledged that § 10(b) was a content-based restriction on the transmission of private speech which, thus, subjected it to a strict scrutiny analysis.²³² Under strict scrutiny, Justice Thomas found that § 10(b) was narrowly tailored to meet the compelling interest of protecting children from indecent materials.²³³ Justice Thomas reasoned that lockboxes and v-chips depended too much on parental initiative.²³⁴ With lockboxes and v-chips, parents must voluntarily purchase or lease a lockbox, learn how to program it, and constantly be aware of the times and stations on which indecent materials are shown.²³⁵ Although lockboxes and v-chips are arguably a less restrictive means to block indecent material, Justice Thomas found the argument mean-

227. The majority pointed to the Telecommunications Act of 1996 to show that § 10(b) was not the least restrictive means to accomplish their goal. *Denver Telecomm. Consortium*, 116 S. Ct. at 2392. The Telecommunications Act of 1996 requires cable operators to "scramble or . . . block" such programming on any unleased channel "primarily dedicated to sexually oriented programming." Telecommunications Act of 1996 § 505(a), 47 U.S.C.A. § 561(a) (West Supp. 1997); *Denver Telecomm. Consortium*, 116 S. Ct. at 2392. Cable operators are also required to honor subscribers' requests to block any or all programs on any channel to which they do not wish to subscribe. Telecommunications Act of 1996 § 504, 47 U.S.C.A. § 560(a).

228. *Denver Telecomm. Consortium*, 116 S. Ct. at 2392.

229. *Id.* at 2393 (quoting *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 128 (1989); *Bolger v. Young's Drug Product Co.*, 463 U.S. 60, 73 (1983)).

230. *Id.* at 2391.

231. *Id.* at 2429 (Thomas, J., concurring and dissenting).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

ingless since those methods had proven ineffective in protecting children's interests.²³⁶

Justice Thomas reasoned that segregation and blocking requirements were not intended to replace lockboxes and v-chips, but rather § 10(b) was a default setting by which a subscriber would not receive blocked programming without a written request.²³⁷ The benefits of the segregation and blocking requirements were twofold: subscribers who did not want blocked programming were protected, and subscribers who did want indecent programming could request access.²³⁸ Under § 10(b), a subscriber that requested access to blocked programming remained free to use lockboxes and v-chips to regulate leased access channels in the interest of their children.²³⁹ Thus, he reasoned § 10(b)'s segregation and blocking requirements work effectively in conjunction with lockboxes and v-chips.²⁴⁰

3. *Section 10(c)—Cable Operators' Regulation of Indecency on PEG Access Channels Held Unconstitutional*

Section 10(c) of the 1992 Cable Act permitted cable operators to decide whether to allow PEG access channels to carry programs that they reasonably believe are patently offensive.²⁴¹ In a plurality opinion, Justice Breyer, joined by Justices Stevens and Souter, found that § 10(c) violated the First Amendment.²⁴² Justice Kennedy, joined by Justice Ginsburg, concurred in the judgment.²⁴³ Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented.²⁴⁴ Justice O'Connor authored a separate dissent.²⁴⁵

a. *Section 10(c)—Plurality Opinion*

Justice Breyer found that § 10(c) violated the First Amendment. Justice Breyer differentiated § 10(c) from § 10(a) for four reasons.²⁴⁶ First, cable operators historically have not exercised editorial control over PEG access channels.²⁴⁷ Second, PEG access channel programming is normally subject to complex supervisory systems comprised of

236. *Id.*

237. *Id.* at 2430.

238. *Id.*

239. *Id.*

240. *Id.* at 2431.

241. *See supra* note 59.

242. *Denver Telecomm. Consortium*, 116 S. Ct. at 2394.

243. *Id.* at 2409 (Kennedy, J., concurring and dissenting).

244. *Id.* at 2426 (Thomas, J., concurring and dissenting).

245. *Id.* at 2403 (O'Connor, J., concurring and dissenting).

246. *Id.* at 2397.

247. *Id.* at 2394.

both public and private elements; therefore, "a cable operator's veto" is less likely to be necessary to protect children from indecent programming.²⁴⁸ Third, the government did not show that there was a significant enough problem of patently offensive broadcasts reaching children on PEG access channels.²⁴⁹ Fourth, a cable operator's veto is more likely to result in erroneous exclusion of borderline programs that should be broadcast on a system that encourages programming that a community considers valuable.²⁵⁰

Justice Kennedy concurred in the judgment that § 10(c) is unconstitutional.²⁵¹ He reasoned that PEG access channels are "designated public forums" because they are property that the State has opened up for expressive activity by part or all of the public.²⁵² He supported this premise by arguing that in return for granting cable operators easements to use public rights-of-way for their cable lines, local governments have bargained for a right to use cable lines for public access.²⁵³ He reasoned that because § 10(c) vests the cable operators with the power to override their franchise agreements, thereby undercutting the public forum agreement, § 10(c) must be given the most "exacting scrutiny."²⁵⁴ Justice Kennedy found that although protecting children from indecent programming is a compelling interest, § 10(c) is not narrowly tailored to serve that interest.²⁵⁵

b. Section 10(c)—Dissenting Opinions

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, disagreed with the plurality opinion for the same reasons that he found § 10(a) to be constitutional.²⁵⁶ Justice Thomas disagreed with Justice Kennedy's analysis of PEG access channels as designated public forums, reasoning that the Court has "never even hinted that regulatory control, and particularly direct regulatory control, over a private entity's First Amendment speech rights, could justify creation of a public forum."²⁵⁷ Justice Thomas also stated that there has never

248. *Id.*

249. *Id.* at 2395.

250. *Id.* at 2395-96.

251. *Id.* at 2404 (Kennedy, J., concurring and dissenting).

252. *Id.* at 2409. For a detailed discussion of public forum analysis, see Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

253. *Denver Telecomm. Consortium*, 116 S. Ct. at 2410 (Kennedy, J., concurring and dissenting).

254. *Id.*

255. *Id.*

256. *Id.* at 2429 (Thomas, J., concurring and dissenting).

257. *Id.* at 2427.

been a public forum designation where a private entity had the "obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf."²⁵⁸

Justice Thomas argued vehemently that cable operators are private entities and should be adjudicated under the same principles as newspaper and bookstore owners.²⁵⁹ He reasoned that a cable operator's editorial rights are stronger than a programmer's right to transmit and a viewer's right to watch.²⁶⁰ Furthermore, Justice Thomas found § 10(c) constitutional because the cable access provisions, as they stand, expand rather than prohibit the free speech opportunities of programmers who have no underlying constitutional right to speak through the cable medium.²⁶¹ According to Justice Thomas, § 10(c) merely restored to cable operators a *small* portion of the editorial discretion taken away by the 1984 Cable Act.²⁶²

Justice O'Connor also dissented, finding § 10(c) constitutional.²⁶³ She did not find validity in the purported differences that the plurality used to strike down § 10(c) while upholding § 10(a).²⁶⁴ In her dissent, she emphasized that the permissive nature of §§ 10(a) and 10(c) neither encouraged nor discouraged cable operators from banning indecent materials on their stations.²⁶⁵ Like § 10(a), § 10(c) did not burden a programmer's right to seek access to indecent programming on cable.²⁶⁶ Rather the provisions merely restored part of the operator's editorial discretion without burdening the programmer's underlying speech rights.²⁶⁷

III. ANALYSIS

This Part begins by discussing the Court's selective application of strict scrutiny to only one of the three 1992 Cable Act provisions at issue in *Denver Telecommunications Consortium*. Next, the proffered rationales for upholding § 10(a) as constitutional while striking down § 10(c) as unconstitutional are found to be disingenuous and analytically unsupported. This Part then proceeds to discuss why the technological advancements in the cable industry make it analytically similar

258. *Id.*

259. *Id.* at 2421.

260. *Id.*

261. *Id.* at 2425-26.

262. *Id.* at 2422-23.

263. *Id.* at 2403 (O'Connor, J., concurring and dissenting).

264. *Id.*

265. *Id.* at 2403-04.

266. *Id.* at 2404.

267. *Id.* at 2403.

to the print medium, make it analytically distinct from the broadcast medium, and justify its analysis under strict scrutiny. Lastly, an argument is set forth demonstrating that § 10(b) survives strict scrutiny because it is the most effective, and therefore the most narrowly tailored means to achieve the compelling interest of protecting children from indecent cable programming.

A. Selective Use of Strict Scrutiny from Conflicting Vantage Points

Denver Telecommunications Consortium poses unique challenges for the Court because it concerns the 1992 Cable Act, which returns to cable operators the right to regulate indecency on their stations, a right which the 1984 Cable Act eliminated.²⁶⁸ Prior to the 1984 Cable Act, absent specific franchise agreements to the contrary, cable operators could choose not to air programming at their discretion, be it for financial, personal, or humanistic reasons.²⁶⁹ In its opinion, the Court struggled to decide whether to apply strict scrutiny, intermediate scrutiny, or the ambiguous *Pacifica* standard to this case and to determine whose rights were paramount—cable operators', cable programmers', or viewers'.

Chief Justice Rehnquist, Justice Scalia, and Justice Thomas argued that the Court should analyze this case under strict scrutiny from the vantage point of cable operators' rights being paramount to cable programmers' and viewers' rights.²⁷⁰ Justices Ginsburg and Kennedy likewise wanted this case analyzed under strict scrutiny, but with the rights of the programmer, and, derivatively the viewer, being paramount to the rights of the cable operator.²⁷¹ The plurality attempted to make analogies to the print, telephone, and broadcast media to find a standard of review appropriate to the cable industry.²⁷² Thrown into this mix was the compelling interest of protecting children from indecent programming.²⁷³ Instead of deciding on a scrutiny level, the plurality used a case-by-case approach to adjudicate §§ 10(a) and

268. See *supra* text accompanying notes 55-57.

269. See *supra* Part I.A.2.

270. *Denver Telecomm. Consortium*, 116 S. Ct. at 2421-23 (Thomas, J., concurring and dissenting); see *supra* text accompanying notes 201-07, 256-62.

271. *Denver Telecomm. Consortium*, 116 S. Ct. at 2410 (Kennedy, J., concurring and dissenting). Cable operators serve as conduits for the speech of other people. *Id.*; cf. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (requiring a shopping center owner to act as a conduit for solicitors on the owner's property).

272. See *supra* Part I.B.1-3.

273. See *Denver Telecomm. Consortium*, 116 S. Ct. at 2391; *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991).

10(c).²⁷⁴ However, the Court *did* use strict scrutiny to analyze § 10(b).²⁷⁵

B. The Plurality's Four Flawed Reasons for Upholding § 10(a)

In its analysis, the plurality advanced four reasons for holding § 10(a) constitutional—all of which are based on conclusory statements and manipulation of prior precedents and terminology. First, the plurality reasoned that § 10(a) comes accompanied with the extremely important child-protection justification that the Court has often found compelling.²⁷⁶ Granted, protecting children from exposure to indecent materials is indisputably a compelling state interest; however, the Court has most often used such language when analyzing a First Amendment issue under strict scrutiny.²⁷⁷ A compelling interest, standing on its own, is never significant enough to justify a regulation.²⁷⁸ Moreover, the plurality conveniently failed to identify any narrowly tailored means which might accompany this compelling interest.

Second, the plurality reasoned that § 10(a) arises in a very particular context, in that, but for a previous act of Congress (the 1984 Cable Act), cable operators would not need congressional permission to regulate indecency on their stations.²⁷⁹ The plurality then proceeded to state that because this Act involves complex First Amendment issues, the rights of the cable operator must be balanced against the rights of the cable programmer and, derivatively, the viewer.²⁸⁰ However, prior to the 1984 Cable Act no balancing was required, and the plurality never explained why returning to the status quo mandates a balancing test. Furthermore, the plurality did not address why a programmer's right to show or a viewer's right to watch indecent material must be balanced against a cable operator's editorial rights

274. See *supra* text accompanying notes 183-91; *supra* Part II.B.3.a.; see generally Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297 (1997) (discussing the terminology of rational, intermediate, and strict scrutiny).

275. See *supra* Part II.B.2.a.

276. *Denver Telecomm. Consortium*, 116 S. Ct. at 2391; see *supra* text accompanying note 185.

277. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989) (using strict scrutiny to prohibit obscene, but not indecent, telephone messages); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986) (using strict scrutiny to strike down the Commission's demand ordering the utility to place a third party's newsletter in its billing envelopes); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (using strict scrutiny to strike down a statute which required newspapers that attacked a political candidate's character to afford free space to the candidate to reply).

278. See *supra* text accompanying notes 65-66.

279. *Denver Telecomm. Consortium*, 116 S. Ct. at 2386.

280. *Id.*

when a newspaper editor, a bookstore owner, or a movie theater owner is not held to a similar balancing standard.²⁸¹ By even requiring a balancing test, the plurality, in effect, holds that the rights of the viewer and programmer have constitutional significance over the rights of the cable operator.²⁸² This was done despite the Court's previous admonishments that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another."²⁸³

Third, the plurality reasoned that the constitutionality of § 10(a) is analogous to the balance the plurality struck with the indecent radio broadcasts at issue in *Pacifica*.²⁸⁴ Although § 10(a) and *Pacifica* both concern indecency, this is about as far as the comparison goes.²⁸⁵ The plurality in *Pacifica* focused much of its attention on statutory interpretation, the constitutional significance of indecency, and a nuisance rationale for banning the indecent programming during specific periods of the day.²⁸⁶ None of the aforementioned were focused on in the plurality's analysis of § 10(a) of the 1992 Cable Act.

Fourth, the plurality reasoned that § 10(a)'s permissive nature restricts "less than, not more than, the ban at issue in *Pacifica*."²⁸⁷ While this is true, the comparison to *Pacifica* is not well formulated because *Pacifica* dealt with a regulation that banned the broadcasting of indecent materials during specific times of the day, whereas § 10(a) restores cable operators' editorial control. In addition, § 10(a) of the 1992 Cable Act involves cable, a medium that a plurality has recognized as significantly different from the broadcast medium, due in

281. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 19-28 (1965) (advocating against legislation that restricts anyone's freedom to speak). But see Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983) (taking the opposite position).

282. See *Denver Telecomm. Consortium*, 116 S. Ct. at 2421 (Thomas, J., concurring and dissenting).

283. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). The essence of the protection that "Congress shall make no law . . . abridging the freedom of speech, or of the press," U.S. CONST. amend. I, is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required. See *Texas v. Johnson*, 491 U.S. 397, 418-20 (1989); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting); *Schenck v. United States*, 249 U.S. 47, 51-52 (1919).

284. *Denver Telecomm. Consortium*, 116 S. Ct. at 2386-87.

285. See Lee, *supra* note 38, at 50 (arguing that any medium can appear similar to broadcasting—for example fuel shortages can lead to government allocation of fuel used to power newspaper delivery trucks).

286. See *FCC v. Pacifica Found.*, 438 U.S. 726, 739-48, 750-51 (1978) (plurality).

287. *Denver Telecomm. Consortium*, 116 S. Ct. at 2387.

large part to the inapplicability of the spectrum scarcity rationale in the cable context.²⁸⁸

Thus, all four of the reasons advanced by the plurality for upholding § 10(a) are easily disputed. The reasons advanced are mainly an attempt to support a desired result without using traditional First Amendment analysis as discussed below. This departure from traditional analysis is necessary to selectively uphold § 10(a) as constitutional while striking down its sister provision, § 10(c), as unconstitutional.

C. The Plurality's Inconsistent Differentiation Between §§ 10(a) and 10(c)

Although the plurality found § 10(a) of the 1992 Act constitutional, the plurality ironically found § 10(c) unconstitutional.²⁸⁹ The plurality advanced four unconvincing arguments for treating § 10(c) differently from § 10(a). First, it reasoned that the historical background of § 10(a)'s leased access channels differs from § 10(c)'s PEG access channels.²⁹⁰ However, the fact that leased access channels were the product of the federal government, whereas PEG access channels initially arose out of the cable franchises awarded by municipalities, does not weaken cable operators' editorial rights.²⁹¹ In upholding § 10(a) by reasoning that it cannot give back editorial rights that cable operators never previously exercised, "[t]he plurality . . . mistakes inability to exercise a right for [the] absence of the right altogether."²⁹²

Second, the plurality differentiates § 10(c) from § 10(a) by reasoning that programming on PEG access channels is "normally subject to complex supervisory systems of various sorts, often with both public and private elements."²⁹³ However, the interest in protecting children from indecent programming is the same irrespective of the supervisory scheme. A local municipality's supervisory scheme does not justify treating § 10(c) as unconstitutional and § 10(a) as constitutional.²⁹⁴ Furthermore, if the supervisory systems are as stringent as the plurality contended, returning editorial discretion to cable

288. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994). Cable is not subject to the physical limitations that affect the broadcast industry. *Id.*; see *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984) (striking down a statute which prohibited certain noncommercial educational broadcasting stations from editorializing because it violated the First Amendment).

289. *Denver Telecomm. Consortium*, 116 S. Ct. at 2390, 2397.

290. *Id.* at 2394.

291. *Id.* at 2403-04 (O'Connor, J., concurring and dissenting).

292. *Id.* at 2425 n.7 (Thomas, J., concurring and dissenting).

293. *Id.* at 2394.

294. *Id.* at 2404 (O'Connor, J., concurring and dissenting).

operators should not result in censorship, since the municipality will already have blocked the indecent programming. Restoring this discretion would only serve as a secondary, precautionary measure cutting in favor of protecting children from patently offensive programming.²⁹⁵

Third, the plurality differentiated § 10(c) from § 10(a) because it reasoned that returning cable operators' editorial discretion on PEG access channels is more likely to exclude "borderline programs" that should be shown than to protect children from indecent programming.²⁹⁶ However, this statement is conclusory, and appellants offered no statistical support and no analogous comparison. Furthermore, it is unlikely that a cable operator will exclude programming for which there is a market demand, regardless of whether it is indecent.²⁹⁷ The plurality never explained why indecent programming receives greater constitutional endorsement on PEG access channels than it does on other cable access and broadcast television channels.

Fourth, the plurality differentiated § 10(c) from § 10(a) because it reasoned that unlike leased channels, the government had not shown that there was a significant nationwide problem of indecent programming reaching children on PEG access channels that justified the regulation.²⁹⁸ However, the plurality did not explain how significant the problem must be before a cable operator should be allowed to reassert its editorial discretion. Ironically, in *Pacifica*, a case to which the plurality in *Denver Telecommunications Consortium* made many broad analogies, the plurality in effect held that just one exposure to indecent programming was too much.²⁹⁹ Given that *Pacifica* solely involved an auditory broadcast, whereas cable indecency has both an auditory and visual impact on children, this line of reasoning typifies the inconsistencies running throughout the plurality's opinion in *Denver Telecommunications Consortium*.

295. See *supra* text accompanying notes 59, 225-28 (discussing the constitutionality of the scrambling and v-chip requirements of the Telecommunications Act of 1996); see also *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772, 790 (D. Del. 1996) (refusing to enjoin the enforcement of the Telecommunications Act of 1996's scrambling provisions).

296. *Denver Telecomm. Consortium*, 116 S. Ct. at 2395.

297. See Chen, *supra* note 6, at 1416. The House Committee reported that the 1984 Cable Act acknowledged that market demand would lead cable operators to provide diverse programming to maximize subscription demands. H.R. REP. NO. 98-934, at 48 (1984), reprinted in 1984 U.S.C.A.N. 4655, 4685.

298. *Denver Telecomm. Consortium*, 116 S. Ct. at 2395-96.

299. *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (plurality).

D. The Plurality's Reluctance to Use a Traditional First Amendment Analysis for §§ 10(a) and 10(c)

In adjudicating §§ 10(a) and 10(c), the plurality elected not to use traditional First Amendment standards.³⁰⁰ It felt that it was "unwise and unnecessary definitively to pick one analogy or one specific set of words" with which to analyze this case.³⁰¹ The plurality did not apply "strict scrutiny," yet it used terminology that alluded to strict scrutiny.³⁰² It used close judicial scrutiny³⁰³ and "extremely important problem"³⁰⁴ or "extraordinary problem"³⁰⁵ for a compelling interest. The plurality explained: "The admonition that the restriction not be unnecessarily great in light of the interest it serves is substituted for the usual narrow tailoring requirements [of strict scrutiny]."³⁰⁶

In its avoidance of traditional First Amendment analysis, the plurality focused on the unique and changing attributes of the cable industry.³⁰⁷ However, the plurality failed to see that as the cable industry technologically advances and is able to increase the number of channels available to viewers, it becomes less like broadcasting and more like the print medium.³⁰⁸ In Justice Thomas's dissent, he stated this point briefly in a footnote:

Curiously, the plurality relies on "changes taking place in the law, the technology, and the industrial structure, relating to telecommunications," to justify its avoidance of traditional First Amendment standards. If anything, as the plurality recognizes, those recent developments—which include the growth of satellite broadcast programming and the coming influx of video dialtone services—suggest that local cable operators have little or no monopoly power and create no programming bottleneck problems, thus effectively negating the primary justifications for treating cable operators differently from other First Amendment speakers.³⁰⁹

The Supreme Court itself has recognized that because of "the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who

300. See *supra* text accompanying notes 183-91, 246-50.

301. *Denver Telecomm. Consortium*, 116 S. Ct. at 2385. The Court has consistently modified the "traditional" First Amendment analysis according to specific needs and problems. *Id.* at 2384-85.

302. *Id.* at 2406 (Kennedy, J., concurring and dissenting).

303. *Id.* at 2385 (plurality); *id.* at 2406 (Kennedy, J., concurring and dissenting).

304. See *supra* note 303.

305. See *supra* note 303.

306. *Id.* at 2406-07 (Kennedy, J., concurring and dissenting).

307. *Id.* at 2402 (Souter, J., concurring).

308. See Lee, *supra* note 38, at 590 (discussing the "dynamic" nature of cable technology).

309. *Denver Telecomm. Consortium*, 116 S. Ct. at 2422 n.3 (citations omitted).

may use the cable medium.”³¹⁰ The Court has also acknowledged that cable is not inhibited by the scarcity of frequency rationale that formerly justified applying a lower level of scrutiny to the broadcast medium.³¹¹ Cable may look like and feel like broadcast television because it is seen on the same television screen; however, its technological composition makes it a very distinct beast.

E. Cable Shares First Amendment Commonalties with the Print Medium

Although cable neither looks like nor possesses technological similarities to the print medium, nonetheless, in terms of First Amendment analysis, cable shares many commonalties with it.³¹² The proliferation and increased ease of entry into cable markets weighs heavily in favor of adjudicating First Amendment issues in the cable arena under strict scrutiny, similar to the print medium.³¹³ In *Turner Broadcasting*, the Court stated that the spectrum scarcity “rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation.”³¹⁴ “[U]nlike broadcasting, which requires limitations on the number of channel allocations to eliminate the problem of interference, cable technology does not require government regulation to prevent interference among cable channels and the technology has the potential for tremendous channel capacity.”³¹⁵ The non-spectrum-

310. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994). Paul Kagain Associates, Inc. predicted the increased number of cable channels available to the *average* television household over a six year period: 59 channels in 1996; 69 in 1997; 80 in 1998; 93 in 1999; 111 in 2000; 135 in 2001; and 157 in 2002. *Turner Broad. v. FCC*, 910 F. Supp. 734, 746 (D.D.C. 1995); *see also* Gray, *supra* note 23, at 1030 (stating that as competition increases in the cable industry, “cable operators will no longer have ‘gatekeeper’ control over the households they serve, and the intellectual underpinnings of the Court’s [scarcity rationale] will collapse”).

311. Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401, 442-43 (1989).

312. *See* Lee, *supra* note 38, at 583-89 (discussing the similarities between the cable and print media). *But see* *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1377-78 (10th Cir. 1981) (distinguishing cable from the print medium based on public domain principles).

313. *See* Lee, *supra* note 38, at 588-91 (arguing that although cable is not “exactly” like the newspaper medium, it is sufficiently unlike broadcasting that cable operators should not be afforded the same “editorial freedom” granted broadcasters).

314. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994); *see* Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 264-282 (1994) (providing a historical overview of the regulation of new technologies).

315. Lee, *supra* note 38, at 580 (citations omitted); *see also* *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45 (D.C. Cir. 1977) (stating that electrical equipment controls interference among speakers on a single cable by dividing the cable into channels). The Court has also observed that technological advances may have rendered the scarcity rationale obsolete for cable television

based aspect of cable allows for a potentially limitless number of viewing and listening options.³¹⁶

Critics of holding the cable medium to the same judicial standard as the print medium argue that the economic barriers to entry in the cable industry render it incomparable to the print medium.³¹⁷ This belief, however, is unfounded because the economic barriers to entry into the cable market are not any greater than those encountered in establishing multimillion dollar printing and distribution facilities.³¹⁸ Additionally, critics argue that unlike the cable medium, the print medium still allows for inexpensive distribution of printed materials and thus the economic barriers for entry are not as great.³¹⁹ This effort to define the print medium as encompassing all forms of distribution, while ignoring the "multiplicity of video distribution mechanisms when defining cable as a distinct medium"³²⁰ is nonsensical.

In addition, just as readers' needs and requests for certain publications are satisfied by market forces, so too will be cable viewers' needs and requests.³²¹ As seen in *WNCN*, the public interest is best served by promoting diversity in entertainment through market forces and competition among communication channels.³²² Because of technological and economic advancements, as well as the proliferation of media sources, there is little support for giving viewers of indecent programming superior rights to cable operators and market demand.³²³ If there is a great demand for indecent materials in a certain community, it is more likely than not that operators will allow programmers to broadcast such material because it is in their best eco-

even though it arguably still applies to broadcast television. See *Turner Broad.*, 512 U.S. at 638; *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984).

316. *Lee*, *supra* note 38, at 580.

317. *Id.* at 587-89.

318. See *Emord*, *supra* note 311, at 440-41 & n.235.

[S]tarting a large market television station is one-seventh as expensive as starting a 250,000 circulation daily newspaper; starting a medium market television station is almost one-fourth as expensive as starting a 65,000 circulation daily newspaper; and starting a small market television station is almost one-half as expensive as starting a 20,000 circulation daily newspaper.

Id. at 441 n.235 (citation omitted).

319. See *Lee*, *supra* note 38, at 588-90.

320. *Id.* at 589.

321. See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 600 (1981).

322. See *supra* text accompanying notes 117-22.

323. See *Chen*, *supra* note 6, at 1471-72. *Chen* argues that the "regulation of mass communications serves no purpose except to protect incumbents on the verge of technological and economic extinction." *Id.* He predicts that as technology advances, the cable industry will become a regulatory ward just as the must-carry provisions of the 1984 and 1992 Cable Acts made broadcast television a regulatory ward. *Id.* at 1472.

nomic interest.³²⁴ Many cable networks broadcast indecent materials on pay channels, such as SPICE and the Playboy Channel. This would satisfy whatever demand for indecent materials a cable operator chooses not to provide on its leased and PEG access channels, just as "fringe magazines" or leaflets satisfy excess demand that newspaper editors choose not to print in its newspaper.³²⁵

Given the similarities of the cable medium to the print medium, the permissive nature of §§ 10(a) and 10(c), and the compelling interest of protecting children from indecent programming, returning cable operators' rights not to show indecent programming is a minor concession. Sections 10 (a) and 10(c) do not require that cable operators ban all or any indecent programming, rather they merely return cable operators' editorial discretion. On a micro-level, in terms of an individual cable operator's total programming, this might have minimal effects. However, on a macro-level, the First Amendment freedoms at issue and the protection of children are of enormous magnitude.

F. The Majority's Selective Use of Strict Scrutiny in Adjudicating § 10(b)

Ironically, even though the plurality did not have a problem departing from traditional First Amendment analysis in adjudicating §§ 10(a) and 10(c) of the 1992 Cable Act, a majority of the Court was quick to analyze § 10(b) under a traditional strict scrutiny test and found it unconstitutional.³²⁶ Why the Court used First Amendment terminology and precedents to adjudicate § 10(b) and not §§ 10(a) and 10(c) is unexplained and puzzling.³²⁷ Why the Court did not use the intermediate scrutiny test that it applied in *Turner Broadcasting*³²⁸ and *Time Warner Entertainment Co.*³²⁹ for cable, is likewise puzzling.

Furthermore, throughout its entire analysis, the plurality compared *Denver Telecommunications Consortium* to *Pacifica* to reach its conclusions that § 10(a) is constitutional and § 10(c) is unconstitutional.³³⁰ However, the Court conveniently did not look to *Pacifica*

324. See *WNCN*, 450 U.S. at 600.

325. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2421 (1996) (Thomas, J., concurring and dissenting); see also Emord, *supra* note 311, at 448-50 (discussing commonalities between cable and the traditional printed press).

326. *Denver Telecomm. Consortium*, 116 S. Ct. at 2391-92, 2394.

327. See *supra* text accompanying notes 183-89, 246-50; *supra* Part II.B.2.a.

328. See *supra* text accompanying notes 141-52.

329. See *supra* text accompanying notes 153-57.

330. See *supra* text accompanying notes 187-91.

for guidance in adjudicating § 10(b).³³¹ In *Pacifica*, the plurality upheld a complete ban on indecency during specific times of the day,³³² whereas in *Denver Telecommunications Consortium*, the plurality struck down § 10(b) which was much less restrictive on viewers' and programmers' rights.³³³ Unlike *Pacifica*, § 10(b) still permitted viewers access to indecent materials at *all* times of the day.³³⁴ Section 10(b) only required that viewers follow written procedures to unblock programming from their televisions.³³⁵ After these procedures were followed, a viewer then had unlimited access to indecent programming on leased access channels.³³⁶ In addition, once unlimited access was obtained, viewers could still use lockboxes to block programming. Section 10(b)'s segregate and block provisions were *not* an all or nothing alternative. Rather they effectively accommodated three competing interests: (1) viewers who wanted to watch indecent programming; (2) programmers who wanted to show indecent programming; and (3) parents who wanted to protect their children from indecent programming.³³⁷

In adjudicating § 10(b)'s segregate and block provisions, the Supreme Court would have been prudent to take note of the Second and Ninth Circuits' analyses of reverse blocking provisions in *Dial Information Services Corp. v. Thornburgh* and *Information Providers' Coalition v. FCC* respectively.³³⁸ Using a strict scrutiny analysis, both courts found that reverse blocking provisions were narrowly tailored to meet the compelling interest of reducing children's access to indecent communication, despite the existence of less restrictive means of limiting access such as credit cards, access codes, and scrambling.³³⁹ The courts reasoned that the aforementioned blocking mechanisms "would not even come close" to alleviating the problem of children gaining access to indecent phone messages.³⁴⁰ Similar to inadequacies of lockboxes and v-chips in the cable arena, these alternative dial-a-

331. *Denver Telecomm. Consortium* 116 S. Ct. at 2391 ("Nor need we here determine whether, or the extent to which, *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue . . ."); see also Wasserman, *supra* note 226, at 1202 (referring to *Pacifica* as an anomaly).

332. See *supra* text accompanying notes 123-33.

333. See *supra* text accompanying note 58.

334. See *supra* text accompanying note 58.

335. See *supra* text accompanying note 58.

336. See *supra* text accompanying note 58.

337. See Brief for Respondents at 27, *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995) (No. 96-1169).

338. See *supra* text accompanying notes 90-101.

339. See *supra* text accompanying notes 90-92, 99-101.

340. See *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535, 1542 (2d. Cir. 1991) (arguing that the court should focus on the "goals as well as [the] means"); *Information Providers' Coali-*

porn blocking mechanisms failed to be effective because they relied too much on parental initiative to be aware of dial-a-porn availability and the available blocking mechanisms.³⁴¹

Additionally, in *Turner Broadcasting*, the United States District Court of Columbia held that must-carry regulations are narrowly tailored. The court stated:

While the “[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals,” a regulation under the intermediate standard of scrutiny “will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.” The narrow tailoring standard is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” Under this standard, “the government is not required to settle for means that serve its interests less effectively merely because an alternative might be less burdensome.”³⁴²

Paradoxically, the *Turner Broadcasting* court held that under intermediate scrutiny a less restrictive regulation is inadequate if it does *not* achieve its goal, whereas, in *Denver Telecommunications Consortium*, under a strict scrutiny test, the Court held that § 10(b) was too restrictive, even though it was the *most effective* means to achieve its goal.³⁴³

Lockboxes and v-chips might be less restrictive than § 10(b)’s segregate and block regulations; however, they have not proven to be the most effective way to limit children’s access to indecent programming.³⁴⁴ It is ironic that the Court upheld restrictions it found to be narrowly drawn when applied to dial-a-porn, which requires affirmative action by children, and yet struck down analogous restrictions on leased access channels, which confront passive and unaware children in the privacy of their homes.³⁴⁵ Furthermore, it is illogical under strict scrutiny in *Denver Telecommunications Consortium* that the narrow tailoring requirement was not satisfied even though it was the most effective means to achieve its goal, whereas under intermediate scrutiny in *Turner Broadcasting* the narrowly tailoring requirement was satisfied despite the existence of less effective means to achieve its

tion v. FCC, 928 F.2d 866, 872-73 (9th Cir. 1991) (citing flaws in a blocking proposal for dial-a-porn services).

341. *Thornburgh*, 938 F.2d at 1541-43.

342. *Turner Broad. v. FCC*, 910 F. Supp. 734, 747 (D.D.C. 1995) (citations omitted).

343. See Wasserman, *supra* note 226, at 1208 (finding the restrictions that the *Denver Telecommunications Consortium* Court struck down were more permissive than the ban upheld in Act III).

344. See Brief for Respondents at 22, *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995) (No. 96-1169).

345. See *supra* text accompanying notes 90-101; *supra* Part II.B.2.a.

goal. Intermediate scrutiny is supposed to be a lesser standard of review.

The Court's holding that § 10(b) is unconstitutional is especially egregious since § 10(b)'s purpose was to segregate and block programming harmful to children's well-being and developmental growth, the protection of which is a compelling interest.³⁴⁶ Indecent programming has consisted of "graphic depictions of intercourse, masturbation, anal and oral sex, and advertising of phone sex lines and escort services."³⁴⁷ In *Ginsberg v. State of New York*,³⁴⁸ the Court stated:

Different factors come into play . . . where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose *different rules*. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the [F]irst [A]mendment in the same ways as those applicable to adults.³⁴⁹

By striking § 10(b), the Court has put an enormous weight on parents to be informed, to purchase, and to learn to use lockboxes if they want to shield their children from indecent materials.³⁵⁰ This weight is especially great on single parents who often lack the time and resources available in two-parent households. Furthermore, children at the greatest risk of exposure to indecent programming are most likely to have parents who will fail to take the proactive steps necessary to shield them from indecent programming on leased access channels.

346. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2391 (1996) (plurality); *New York v. Ferber*, 458 U.S. 747, 756-57 (1992); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968).

347. See United States Amicus Brief, at *3, n.2, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996) (plurality) (Nos. 95-124, 95-227), 1996 WL 34130. "[O]ne of Time Warner's southern Manhattan cable system's channels—35—has been home to a substantial amount of sexually explicit programming." *Id.* at *2.

348. 390 U.S. 629 (1968). The Court upheld a criminal obscenity statute which prohibited the sale of magazines containing statements of sexual conduct and excitement to minors under 17 years of age. *Id.* at 636-37.

349. *Id.* at 638 n.6 (emphasis added) (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-39 (1963)).

350. See Brief for Respondents at 24, *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995) (No. 96-1169); see also *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (reasoning that the custody, care and nurturing of a child resides first with the parents); Wasserman, *supra* note 226, at 1214-15 (discussing parental control over children's viewing of indecency on cable and broadcast television).

IV. IMPACT

The Court's case-by-case analysis leaves little precedent by which to adjudicate future First Amendment challenges in the cable arena. This creates a precarious situation since the technological changes affecting cable television are not occurring in a vacuum.³⁵¹ The Court's holding and analysis have ramifications on cyberspace,³⁵² high powered direct broadcast satellite service, wireless two-way data transmission, and telephone companies' development of video and data networks both independently and with cable partners.³⁵³ Courts and legislatures will face the difficult task of developing guidelines and rules based on the assumption that cable requires an analysis distinct and separate from traditional First Amendment analysis.³⁵⁴ Lower courts and the Supreme Court itself will have great difficulty in applying the obtuse rule that came out of *Denver Telecommunications Consortium*. One can only speculate whether the Court will use the intermediate scrutiny test of *Turner Broadcasting*³⁵⁵ and *Time Warner Entertainment Co.*³⁵⁶ or whether it will address First Amendment issues in technologically advancing industries with reference to ambiguous and undefined terms such as "close judicial scrutiny,"³⁵⁷ "extremely important problem"³⁵⁸ and "extraordinary problem"³⁵⁹ that it used in this case.

V. CONCLUSION

In *Denver Telecommunications Consortium*, the plurality neither relied on previous precedents and established levels of review, nor did it create new precedents that can be applied to future cases. Instead, the plurality decided the outcome of the case and then applied precedent, statutes, and FCC regulations selectively to meet its agenda.

351. See Corn-Revere, *supra* note 314, at 263.

352. See Michael Johns, *The First Amendment and Cyberspace: Trying to Teach Old Doctrines New Tricks*, 64 U. CIN. L. REV. 1383, 1383-86 (1995-96) (discussing First Amendment freedoms in cyberspace).

353. See Corn-Revere, *supra* note 314, at 263; see also Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1075-80 (1992) (discussing inter alia telephone and cable cross ownership rights).

354. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2402 (1996) (Souter, J., concurring); see also Andrew C. Barnett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 FED. COMM. L.J. 39, 40-48 (1993-94) (discussing the government as regulator and lawmaker).

355. See *supra* text accompanying notes 141-52.

356. See *supra* text accompanying notes 153-57.

357. See *supra* notes 183, 303 and accompanying text.

358. See *supra* note 304 and accompanying text.

359. See *supra* notes 184, 305 and accompanying text.

This is apparent in the plurality's nebulous differentiation between the constitutionality of §§ 10(a) and 10(c) of the 1992 Cable Act, its inconsistent analogies to the broadcast industry, and its manipulation of traditional First Amendment terminologies. Moreover, the Court's willingness to use a traditional, strict scrutiny First Amendment analysis for § 10(b) and not for §§ 10(a) and 10(c) underscores the duplicity of this decision.

The plurality's ad-hoc gathering and manipulation of rules in this case leaves cable in a doctrinal wasteland. The use of stringent standards in certain contexts and less stringent standards in other contexts undercuts judicial integrity. The plurality justified its reluctance to apply a traditional First Amendment test because of the rapid and technological changes occurring in the cable industry. However, it seems the plurality missed the forest for the trees, since the proliferation and ease of entry into the cable market makes it most comparable to the print medium. Under the print medium's strict scrutiny test, the plurality would not have to do a balancing act among the cable operator, the cable programmer, and the viewer, because the rights of the cable operator, like a newspaper publisher would be paramount. Consequently, §§ 10(b) and 10(c), and not just § 10(a), of the 1992 Cable Act would be constitutional under the First Amendment.

If the plurality is reluctant to set a standard for cable because of its concern about technology's direction, should it not begin by expanding cable operators' rights to speech rather than suppressing them? After all, speech also carries with it the right not to say anything!